of an ordinary character and reasonable safety and that the former is the test of the latter, thus making ordinary, or common use conclusive of the employer's nonliability. *Titus* v. *Bradford, B. & K. Ry. Co.,* 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. Rep. 944; *Ford* v. *Mt. Tom Sulphite Pulp Co.,* 172 Mass. 554, 52 N. E. 1065, 48 L. R. A. 96.

According to some of the best considered decisions, however, proof of the common use of an appliance is held to be prima facie proof, only, of the nonliability of the employer, and capable of being rebutted by the proof of the dangerous character of the appliance. *Prattville Cotton Mills* v. *McKinney,* 178 Ala. 554, 59 South. 498; *Winkler* v. *Power & Mining Machinery Co.,* 141 Wis. 244, 124 N. W. 273; *Geno* v. *Fall Mountain Paper Co.,* 68 Vt. 568, 35 Atl. 475. See *Wabash Ry. Co.* v. *McDaniels,* 107 U. S. 454. The ground for this view is that many well regulated plants do not use due or proper diligence in regard to every appliance in the plant, and for this reason proof of customary use should not raise a conclusive presumption that any particular appliance is reasonably safe. On principal, it would seem that the view of the principal case is sound, and that proof of the common use of an appliance should be strong prima facie evidence of the employer's nonliability, to be rebutted only by the clearest proof of its dangerous character. See *Going* v. *Alabama Steel & Wire Co.,* 141 Ala. 537, 37 South. 784.

MUNICIPAL CORPORATIONS—POLICE POWERS—REGULATION OF BILL-BOARDS.—A city ordinance provided that any person who allowed any advertisement of liquor to be displayed on his property should be deemed guilty of suffering a nuisance to exist. *Held,* the ordinance is invalid. *Haskell* v. *Howard* (Ill.), 109 N. E. 992. For principles involved, see 2 VA. L. REV. 72.

NEGLIGENCE—NEGLIGENCE OF HUSBAND AS IMPUTED TO WIFE.—The plaintiff's intestate was killed in a collision with defendant's train, while riding in a vehicle driven by her husband. *Held,* the husband's negligence will not be imputed to the wife. *Chicago & E. R. Co.* v. *Biddinger* (Ill.), 109 N. E. 953. For discussion of the principles involved, see 1 VA. L. REV. 252.

PAYMENT—RECOVERY OF PAYMENT MADE UNDER DURESS.—As a condition precedent to the obtaining of a liquor license an illegal fee was exacted from the plaintiff. The loss of the license would have occasioned great depreciation in the value of the plaintiff's property. Had he been entitled to the license, the plaintiff could have obtained the same by legal proceedings. *Held,* there can be no recovery. *Baldwin* v. *Village of Chesaning* (Mich.), 154 N. W. 84. See NOTES, p. 309.

POWERS—NON-EXCLUSIVE POWER—ILLUSORY APPOINTMENT.—A beneficiary under a will was given certain property which, upon his death, should be distributed as he might direct by his last will to his wife and heirs at law. The donee of this power, by will, appointed a sum of $147,000 to his widow, and only $1,000 to his heirs at law. *Held,* the appoint-

ment is void, since it is merely illusory. *Barret* v. *Barret* (Ky.), 179 S. W. 396.

The rule appeared to be at one time established in England that where a non-exclusive power was given to appoint among a class, whereby no right existed to exclude any member thereof, then in equity at least, there must be a substantial appointment to each member, or the appointment will be regarded as illusory and hence void. *Wall* v. *Thurbane,* 1 Vern. 414; *Spencer* v. *Spencer,* 5 Ves. 362; *Kemp* v. *Kemp,* 5 Ves. 849. See 2 SUGDEN, POWERS, 534 *et seq.* But a substantial part only need be given to each member of the class, and equality is not necessary. *Butcher* v. *Butcher,* 1 Ves. & B. 79, 5 Gray's Cas. 371. This doctrine has now been abrogated in England, by the statute of 37 and 38 Vict. c. 37, § 1. See MINOR, REAL PROP., § 1320; TIFFANY, REAL PROP., § 288.

In this country, the authorities are in a very unsatisfactory state. By some strong *dicta,* the former English rule that where the donee of a non-exclusive power fails to give to each member of the class a substantial share, the appointment is regarded as illusory and void, would seem to be regarded with favor by certain courts. See *Clay* v. *Smallwood,* 100 Ky. 212, 38 S. W. 7; *Knight* v. *Yarbrough,* 21 Va. 27; *Thrasher* v. *Ballard,* 35 W. Va. 524, 14 S. E. 232. See TIFFANY, REAL PROP., § 288; 17 HARV. L. REV. 498.

In those cases, however, in which the precise point has arisen, it has been held that the doctrine of illusory appointments will not be applied. *Hawthorn* v. *Ulrich,* 207 Ill. 430, 69 N. E. 885; *Graef* v. *De Turk,* 44 Pa. St. 527; *Cowles* v. *Brown,* 8 Va. 477. See also, *Lines* v. *Darden,* 5 Fla. 51, 81; *Fronty* v. *Fronty,* 1 Bailey Eq. (S. C.) 509, 522. And this would seem to be the better rule. Thus, where a power of appointment among a class is given by will, a court of equity should not control the appointments actually made, where the donee of the power has acted in good faith, even though the shares given to the various members of the class may appear to the average mind to be unequal and the discrimination unwise. *Portsmouth* v. *Shackford,* 46 N. H. 423; *Graef* v. *DeTurk, supra.* See also, *Lines* v. *Darden, supra.* The donor of the power has relied upon the discretion of the donee, and for a court to prohibit the exercise of this discretion would be to disregard the express command of the donor. See *Bax* v. *Whitbread,* 16 Ves. 15; *Fronty* v. *Fronty, supra.* Of course, where the exercise of the power by the donee has been actuated by fraudulent motives, then a court of equity should annul the appointments made thereunder, since no one may profit by his own wrong. *Stocker* v. *Foster,* 178 Mass. 591, 60 N. E. 407; *Degman* v. *Degman,* 98 Ky. 717, 34 S. W. 523. And where the exercise of the power is declared void, or the power has not been exercised, the estate is distributed equally, on the ground that equality is equity. *Wetmore* v. *Henry,* 259 Ill. 80, 102 N. E. 189; *Degman* v. *Degman, supra.*

TRIALS—CHANCE VERDICT—GROUNDS FOR NEW TRIAL.—A jury, being unable to reach a verdict, agreed that the case should be decided by tossing up a coin. This method was pursued and a verdict rendered in accordance with the result, whereupon a motion for a new trial was made.